



TEXAS WORKFORCE COMMISSION
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GREG ABBOTT

Governor

April 2, 2019

Representative Ramon Romero, Jr.
State Representative, District 90
Room E2.322
PO Box 2910
Austin, TX 78768

Dear Representative Romero:

Thank you for your letter of March 26, 2019, concerning TWC's actions with regard to the development of the proposed marketplace contractor rule that is currently under consideration by the Commission. I appreciate your concerns and responsibilities and share your desire to see that all legal requirements are fulfilled in the agency's rulemaking process.

The purpose of the rulemaking is to provide clarity on the status of marketplace contractors in Texas. Contrary to what has been suggested or alleged by various sources, the proposed rule does not allow for an independent contractor classification merely by the existence of a website or a digital platform.

TWC will not allow any employer to use any rule to avoid their legal obligations. If adopted, the rule will weigh both in favor of and against employers, depending on the facts of each case. We do not prejudge cases, and we are very strict in applying the standards in applicable statutes and rules. With or without this rule in place, the legal presumption in all employment status cases will continue to be in favor of employment. The state and federal labor laws guide our decisions, and we are and will remain loyal to carrying out the letter and spirit of the law.

Furthermore, the Commission has neither changed the 20-factor test nor reduced it to 9 factors. Instead, we are attempting to provide guidance for specific criteria that are most relevant for this emerging sector of the economy. Interestingly, those nine considerations actually touch upon not just nine, but 14, of the 20 factors. At TWC, not all of the 20 factors will come into play in every employment status case, and different factors will be relevant for different lines of work. Common to each case, though, is the underlying presumption from Section 201.041 of the Texas Labor Code (Act), and expressed in Rule 821.5 (the official 20-factor test) that personal services performed for compensation constitute employment, unless the employer proves to TWC's satisfaction that the work is fundamentally free from control or direction, both under the contract of hire and in fact. That has always been a tough and demanding test to meet, and that will not change regardless of what happens with the marketplace contractor rule proposal.

I regret that your inquiry infers answers and allegations that are not accurate. Nonetheless, I welcome the opportunity to address your concerns and clarify the issues, and to the extent that I understand the questions, I am responding herein.

No one in my office knew, inquired about, or investigated the registration status of the employer representatives, nor is that required. My office responds to all inquiries from those that contact our office with TWC-related questions. We do not ask whether they are licensed, certified, registered, or affiliated with particular groups as a condition of asking for, receiving, or offering information, input, opinions, or requests for assistance. As I understand, each lobbyist is responsible for conducting their activities legally, and state lobbyist registration oversight falls under the Texas Ethics Commission.

I want to emphasize that my office, like any other office or department of TWC, is bound by Texas ethics laws and the agency's own ethics policy. The ethics policy was developed over a period of many months by TWC's own Ethics Office and Office of General Counsel and was reviewed by each Commissioner office prior to adoption. Everyone on my staff, just like every TWC employee, goes through the mandatory training on ethics laws and guidelines, and we observe those laws in all of our activities.

Regarding your inquiry about receipt of the language of the proposed rule, the law does not speak to the source of or degree to which suggested language is considered; however, the Administrative Procedure Act requires a robust notice, public comment process, and eventual adoption by a governmental body. It is not unusual for unemployment insurance (UI) statutes and agency rules to closely correspond to each other across the nation. All regulations relating to UI must be in conformity with federal UI laws and regulations, and each must be officially reviewed and approved by the U.S. Department of Labor. The language did not depart appreciably from similar laws in other states that have already passed the DOL federal law conformity process. Those laws in turn bear some similarities to other laws relating to different industries and occupations.

Regardless of the point of contact, be it a business, lobbyist, public interest group, or individual, rest assured that TWC does not simply accept input from external sources without conducting our own full investigation, research, and analysis of all relevant issues, guidelines, and legal standards.

As for information available to TWC's Communication's Director, neither I nor anyone in my office concealed anything from the director as your question suggests. I would not tolerate any effort on the part of my staff, nor would TWC's Executive Director tolerate any effort on the part of the rest of TWC's staff members, to withhold any relevant information that is subject to release under the law. Once requests for information came in, TWC staff, including everyone in my office, promptly identified any responsive documents as instructed from TWC's Open Records Department.

Without speaking for the director, it appears there may have been a misunderstanding regarding outside sources providing input to my office versus the ultimate independence of staff and my office when considering what proposal language is appropriate to pursue. My primary role on the Commission is to advocate for employers. My office gathers and receives information from members of the public and we conduct our own due diligence in researching and analyzing issue, exploring best practices, discussing the information with constituents and listening to stakeholder research and information. Regardless of any input received, no one even potentially subject to TWC regulation or oversight would have

the ability to dictate what my office or the rest of the agency does, since the actions we take are based on our own research, deliberation, and assessment of what would be best and proper for any particular case or situation. As explained above, there was no concealment.

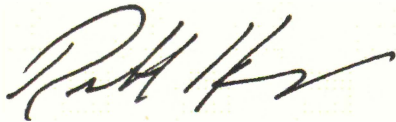
I speak to the Office of the Governor to keep them updated on my work at TWC. Furthermore, as requested of all state agencies, TWC advised the Governor's office of the draft rule.

I remain committed to TWC's mission of supporting a workforce system that creates value and offers employers, individuals, and communities the opportunity to achieve and sustain economic prosperity. In my role as the TWC Employer Commissioner, I work to understand the needs of employers and take great pride in serving as the first line of resources for all Texas employers.

In conclusion, this proposed rule, should it be adopted, will not pass without a majority of the Commission voting in favor of it. As I do with all items up for approval by TWC Commissioners, I will consider all of the issues, all of the competing interests, and all of the public comments. Each of us will base our decision on the law and what we truly believe is best for the agency, the workforce system, and the constituents we represent (Labor, Public, and Employers).

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ruth Hughs', with a stylized flourish at the end.

Ruth R. Hughs, Chair
Commissioner Representing Employers
Texas Workforce Commission